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LOH TECK WAH v. LIEW CHIA SOON & ANOR AND ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
ADLIN ABDUL MAJID JC
[ORIGINATING SUMMONS NOS: WA-24NCC-85-02-2022
& WA-24NCC-611-04-2022]
29 DECEMBER 2022

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Abstract – *A declaration of trust may be made either formally or informally. If it is made informally or orally, the words used must be clear, unequivocal and irrevocable. A trust, however, can only be given effect if it does not violate the law. In a case where the alleged trust would result in a contravention of s. 218 of the Companies Act 2016 and undermine the well-established principles of a director's fiduciary duties to a company, the courts should not give effect to such trust. A director is by law required to conduct himself with utmost good faith and abstain from any risk of conflict of interest.*

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TRUSTS: *Shares – Breach – Allegation of – Claim of trust relationship between plaintiff and first defendant – Whether there was creation of trust arrangement – Whether shares held on trust – Whether there was certainty of intention that trust existed – Doctrine of judicial estoppel – Whether applicable*

E

COMPANY LAW: *Directors – Appointment of – Allotment of shares – Whether carried out in manner within authority of sole director and shareholder of company – Whether validly carried out*

F

COMPANY LAW: *Directors – Conflict of interest – Whether director permitted to engage in business in competition with another company he also director of – Whether engagement prohibited under s. 218 of Companies Act 2016 – Whether well-established principles of director's fiduciary duties to company would be undermined – Doctrine of Patel v. Mirza*

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The plaintiff filed the following actions at the High Court, originating summons referred to as OS 85 and OS 611. As there were common questions of law and facts arising in OS 85 and OS 611, the two actions were consolidated. In OS 85, the plaintiff ('Loh') sought, *inter alia*, a declaration that the 100,000 ordinary shares of Fintree registered in the name of Liew ('Liew's shares') were held by Liew on trust for Loh. In OS 611, filed against the first defendant ('Liew'), the second defendant ('Fintree'), third defendant ('PNLBS'), the fourth defendant ('Paul') and fifth defendant ('Nicholas') as directors of Fintree, Loh sought, *inter alia*, a declaration that the allotment and issuance of the 110,000 ordinary shares in Fintree to PNLBS ('PNLBS'

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shares') were in breach of Liew's trust to him. Loh, Paul and Nicholas have been in business together since 2002, a partnership known as the PNL Group. Since 2019, there was a series of discussions on the re-organisation of the group, which continued until February 2020 but all discussions ceased after March 2020 when the parties could not reach an agreement. Fintree was incorporated on 14 May 2020 and was in the business of providing financing advisory services, which is the same as the business of the PNL Group. Prior to the incorporation of Fintree, Liew was an employee of the PNL Group. The issued and paid-up capital of Fintree upon its incorporation was RM1. As at 10 August 2020, its total paid-up capital was RM100,000, made up of Liew's shares. On 11 March 2022, Fintree's paid-up capital was increased by RM110,000 with the issuance and allotment of PNLBS' shares. The total paid up capital of Fintree was then RM210,000. For a more comprehensive understanding of the dispute giving rise to the filing of OS 85 and OS 611, the other actions filed by the parties must also be considered. In December 2020, companies within the PNL Group commenced Suit 623 against Liew and Fintree. The parties in Suit 623 alleged that Liew had breached the terms of his employment and duties by wrongfully accessing and taking confidential records and documents that were in their possession. An *Anton Piller* order was obtained in Suit 623, and an *Anton Piller* raid was conducted to seize documents from Fintree. The *Anton Piller* raid revealed that documents belonging to companies within the PNL Group had been wrongfully transferred out, and were in Fintree's premises. It was also revealed that Loh played an instrumental role in the setting up of Fintree. Two consent judgments were entered into for Suit 623 ('consent judgments'), between the PNL Group and Liew, and the PNL Group and Fintree. In the consent judgments, Liew admitted to the allegations in Suit 623, including the allegation that he was working with Loh, to cause the near collapse of the business of the PNL Group. The consent judgments were set aside as it was discovered that Fintree was under judicial management, as initiated by Loh, at the material time. However, the Court of Appeal allowed the appeals against the grant of the judicial management order on Fintree. The main issue in OS 85 and OS 611 related directly to the status of the shares in Fintree. Loh's contentions were: (i) Liew's shares were held by Liew on trust for Loh; (ii) Liew's exercise of power to allot PNLBS' shares to PNLBS was invalid as the allotment was made without Loh's consent; and (iii) Liew's exercise of power to appoint Paul and Nicholas as Fintree's directors was invalid, on the same ground. Premised on these contentions, Loh sought, *inter alia*, the following reliefs in OS 85: (i) a declaration that Liew's shares were held on trust by Liew on behalf of Loh; (ii) a declaration that Loh was the legal and beneficial owner of Liew's shares; and (iii) an order that Liew carry out and/or take all necessary steps to effect and perfect the transfer of Liew's shares from Liew to Loh and/or his nominee. Loh subsequently filed OS 611 against Liew, Fintree, PNLBS, and Paul and Nicholas as directors

of Fintree. He sought *inter alia*, the following reliefs in OS 611 (i) a declaration that the allotment and issuance of PNLBS' shares were in breach of Liew's trust to Loh; (ii) a declaration that the registration of PNLBS' shares in the name of PNLBS in the register of members of Fintree was invalid, void and of no effect; (iii) an order that PNLBS' shares be cancelled from the register of Fintree; (iv) a declaration that Liew had acted in breach of trust in causing the unlawful appointments of Paul and Nicholas as directors of Fintree; and (v) a declaration that the appointments of Paul and Nicholas as directors of Fintree were invalid, void and of no effect, and that these appointments be invalidated and/or set aside.

Held (dismissing encls. 1 in both OS 85 and OS 611):

(1) Loh's allegation that Liew's shares were held on trust for him was not supported by any documentary evidence. Instead, Fintree's incorporation documents and resolutions as well as documents filed with the Companies Commission of Malaysia showed that Liew had incorporated Fintree on 14 May 2020. He was the sole director and shareholder in Fintree and had paid the sum of RM1 for the initial share capital of Fintree. By way of a member's circular resolution and a director's circular resolution, 99,999 new ordinary shares were issued to Liew for RM99,999 by way of capitalisation of the amount owing by Fintree to Liew. After the issuance and allotment of new shares, Liew held 100,000 shares in Fintree *ie*, Liew's shares. Loh could not have advanced the sum of RM100,000 for Fintree's initial paid-up capital at the material time. Further, Loh did not provide any evidence to support his claim that he asked Liew to hold Liew's shares on trust for him, on the specific basis that the said shares were to be re-transferred to Loh or a nominee of Loh's choice at the time of Loh's choosing. Liew did acknowledge that, *inter alia*, Loh had advanced monies to him to be used towards the paid-up capital of Fintree, but this did not create a trust relationship such that Liew's shares belonged beneficially to Loh or that Liew's shares were held by Liew on trust for Loh. (paras 16-21)

(2) A declaration of trust may be made either formally or informally. If it was made informally or orally, the words used must be clear, unequivocal and irrevocable. The burden of proof fell on Loh to establish the creation of a trust arrangement. JM1 was Loh's application to place Fintree under judicial management, on the basis that Loh was a creditor of Fintree. Loh's position in JM1 was inconsistent with what he was now asserting, that he had asked Liew to hold Liew's shares on trust for him. With the inconsistency in the stand taken by Loh in the proceedings before this court, Loh had failed to discharge the high burden of proving the existence of a trust. Such inconsistency led to the

conclusion that there was no certainty of intention that could have led to the reasonable probability that a trust existed in respect of Liew's shares. The totality of the circumstances of the cases before this court, and in particular the position taken by Loh in JM1, had raised questions on Loh's actual intention in his dealings in Fintree. Consequently, there was no certainty of intention in relation to the creation of trust over Liew's shares. (paras 25-32)

(3) The averments by Loh that he was a creditor of Fintree also gave rise to the doctrine of judicial estoppel. It was not open to Loh to now resile from his earlier position and make positive averments in these actions that were inconsistent and wholly contradictory to the position he had taken in JM1. By his averments in JM1, Loh had abandoned or renounced any claim of beneficial ownership to the shares of Fintree. If this was not the case and Loh was insisting on pursuing his claim of beneficial ownership of the shares of Fintree, this would mean that his claims and averments in JM1 were false and designed to mislead the court. The averments Loh made in JM1 had led to the High Court making certain findings of facts, and Loh was now disowning those averments in the actions before this court. Loh had failed to prove the existence of a trust in respect of Liew's shares. (paras 33-38)

(4) The issuance and allotment of PNLBS's shares and the appointment of the additional directors of Fintree were authorised by Liew as sole director and shareholder of Fintree. As Liew was the sole shareholder and director of Fintree, he had both actual and implied authority to allot PNLBS shares and appoint Nicholas and Paul as directors of Fintree. Thus, the issuance and allotment of PNLBS's shares and the appointment of Paul and Nicholas as directors of Fintree had been validly carried out. (paras 39-41)

(5) The cumulative effects of the prayers of OS 85 and OS 611 would be to oust both Liew and PNLBS as shareholders of Fintree, resulting in Loh having 100% control over Fintree's shares. Loh would consequently have sole control over Fintree, thus allowing him to continue Fintree's business under his sole direction. However, the following undisputed facts must be considered, that Loh was a director of PNLBS, which had been carrying out the business of financial advisory services and Fintree, since its incorporation had been carrying out the same type of business as PNLBS. Loh's involvement in Fintree in the manner sought in the prayers in OS 85 and OS 611 would put him in a position of conflict of interest *vis a vis* his position as a director of PNLBS. Loh was not permitted to engage in business that was in competition with the business of PNLBS, a company in which he was a director. The prayers in OS 85 and OS 611, if allowed, would result in an engagement prohibited under s. 218 of the Companies Act 2016

as Loh would own and have full control over Fintree, a company in direct competition with PNLBS. Thus, applying the doctrine in *Patel v. Mirza*, OS 85 and OS 611 should be dismissed. (paras 43-50)

(6) Section 218 of the Companies Act is intended to protect a company from the misuse of its property, information and resources by a director or an officer of the company in a manner that would deprive the company of business and opportunities. Specifically, s. 218(1)(e) prevents a director of a company from undertaking competing businesses, which would put him in a position of conflict of interest. A director is by law required to conduct himself with utmost good faith and abstain from any risk of conflict of interest. Allowing OS 85 and OS 611 would mean Loh would be managing Fintree, a situation which would put him in direct conflict with his duties as a director in PNLBS. Conversely, denying Loh of the prayers in OS 85 and OS 611 would enhance the purpose of s. 218. Further, a trust could only be given effect if it did not violate the law. In this case, the alleged trust would result in a contravention of s. 218 and undermine the well-established principle of a director's fiduciary duties to a company. As such, the court should not give effect to the trust. The dismissal of OS 85 and OS 611 would be a proportionate response to the illegality arising from Loh's management of Fintree in conflict with PNLBS. (para 53)

Case(s) referred to:

ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd [2004] 4 CLJ 674 CA ***(refd)***

Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd & Another Appeal [2006] 1 CLJ 996 CA ***(refd)***

Ikumi Terada v. Jemix Co Ltd & Ors And Other Appeal [2019] 1 LNS 881 CA ***(refd)***

Leisure Farm Corporation Sdn Bhd v. Kabushiki Kaisha Ngu & Ors [2017] 1 LNS 499 CA ***(refd)***

Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd [2019] 1 CLJ 183 FC ***(refd)***

Patel v. Mirza [2017] 1 All ER 191 ***(foll)***

Peguam Negara Malaysia v. Nurul Izzah Anwar & Ors [2017] 5 CLJ 595 CA ***(refd)***

Perman Sdn Bhd & Ors v. European Commodities Sdn Bhd & Anor [2005] 4 CLJ 750 CA ***(refd)***

Re Kayford Ltd [1975] 1 All ER 604 ***(refd)***

Teoh Heng Seng & Ors v. Teoh Kiew Seng & Anor [2005] 3 CLJ 15 CA ***(refd)***

Wan Naimah v. Wan Mohamad Nawawai [1972] 1 LNS 164 FC ***(refd)***

Legislation referred to:

Companies Act 2016, s. 218(1)(e), (2)

(Originating Summons No: WA-24NCC-85-02-2022)

For the plaintiff - PL Leong, Shim De Zhen & Hazwan Lee Haris Lee; M/s Yeoh Shim Siow & Lay Kuan

For the 1st & 2nd defendants - Brendan Siva & Aida Haryani; M/s Brendan Siva

(Originating Summons No: WA-24NCC-611-04-2022)
For the plaintiff - PL Leong, Shim De Zhen & Hazwan Lee Haris Lee; M/s Yeoh Shim Siow & Lay Kuan
For the 1st & 2nd defendants - Brendan Siva & Aida Haryani; M/s Brendan Siva
For the 3rd-5th defendants - Yap Boon Hau & Fang Kai Loon; M/s Mah-Kamariyah & Philip Koh

Reported by Suhainah Wahiduddin

JUDGMENT

Adlin Abdul Majid JC:

Introduction

[1] The following actions were filed by the plaintiff:

(i) Kuala Lumpur High Court Originating Summons No. WA-24NCC-85-02-2022 ("OS 85"); and

(ii) Kuala Lumpur High Court Originating Summons No. WA-24NCC-611-04-2022 ("OS 611").

[2] As there are common questions of law and fact arising in OS 85 and OS 611, the two actions were consolidated. I will refer to the parties in both actions in the following manner:

(i) the plaintiff in OS 85 and OS 611 is referred to as "Loh";

(ii) the first defendant in OS 85 and OS 611 is referred to as "Liew";

(iii) the second defendant in OS 85 and OS 611 is referred to as "Fintree";

(iv) the third defendant in OS 611 is referred to as "PNLBS";

(v) the fourth defendant in OS 611 is referred to as "Paul"; and

(vi) the fifth defendant in OS 611 is referred to as "Nicholas".

[3] In OS 85, Loh sought *inter alia*, a declaration that the 100,000 ordinary shares of Fintree registered in the name of Liew ("Liew's shares") are held by Liew on trust for Loh. In OS 611, filed against Liew, Fintree, PNLBS, and Paul and Nicholas as directors of Fintree, Loh sought, *inter alia*, a declaration that the allotment and issuance of the 110,000 ordinary shares in Fintree to PNLBS ("PNLBS' shares") are in breach of Liew's trust to him.

[4] I dismissed both actions, as I found Loh had failed to prove Liew's shares were held on trust for Loh. This is due to there being insufficient evidence to prove a trust relationship, and due also to the inconsistent position taken by Loh concerning his capacity in Fintree. Further, I found the allotment of PNLBS' shares and the appointment of Paul and Nicholas as Fintree's directors, were carried out by Liew in a manner that is within his authority as the sole director and shareholder of Fintree.

[5] Finally, I took the view that the prayers sought in OS 85 and OS 611 will result in the continuous breach of Loh's duties to PNLBS, and as such, the actions ought to be dismissed.

Background Facts

[6] Loh, Paul and Nicholas have been in business together since 2002. This partnership is known as the "PNL Group".

[7] Since 2019, there was a series of discussions on the reorganisation of the group. These meetings and discussions continued until February 2020. Parties could not reach an agreement, and all discussions ceased after March 2020.

[8] Loh incorporated Fintree on 14 May 2020. Fintree is in the business of providing financing advisory services, which is the same as the business of the PNL Group. Prior to the incorporation of Fintree, Liew was an employee of the PNL Group. He left the group on 17 April 2020.

[9] The issued and paid-up capital of Fintree upon its incorporation was RM1. As at 10 August 2020, its total paid-up capital was RM100,000, made up of Liew's shares. On 11 March 2022, Fintree's paid-up capital was increased by RM110,000 with the issuance and allotment of PNLBS' shares. The total paid-up capital of Fintree as at 11 March 2022 was RM210,000.

[10] For a more comprehensive understanding of the dispute giving rise to the filing of OS 85 and OS 611, the other actions filed by the parties must be also considered:

(i) In December 2020, companies within the PNL Group commenced Kuala Lumpur High Court Suit No. WA-22NCC-623-12-2020 ("Suit 623") against Liew and Fintree. The plaintiffs in Suit 623 alleged that Liew had breached the terms of his employment and duties by wrongfully accessing and taking confidential records and documents that were in their possession.

(ii) An *Anton Piller* order was obtained in Suit 623, and an *Anton Piller* raid was conducted to seize documents from Fintree. The *Anton Piller* raid revealed that documents belonging to companies within the PNL Group had been wrongfully transferred out, and were in Fintree's premises. It was also revealed that Loh played an instrumental role in the setting up of Fintree.

(iii) On 19 January 2021, two consent judgments were entered into for Suit 623 ("consent judgments"), between the PNL Group and Liew, and the PNL Group and Fintree. In the consent judgments, Liew admitted to the allegations in Suit 623, including the allegation that he was working with Loh, to cause the near collapse of the business of the PNL Group.

(iv) The consent judgments were set aside *vide* Kuala Lumpur High Court Originating Summons No. WA-24NCC-40-02-2021 ("OS 40"), as it was discovered that Fintree was under judicial management, as initiated by Loh, at the material time.

(v) However, on 21 February 2022, the Court of Appeal allowed the appeals against the grant of the judicial management order on Fintree.

[11] The main issue in OS 85 and OS 611 relates directly to the status of the shares in Fintree. Loh's contentions are as follows:

(i) Liew's shares are held by Liew on trust for Loh;

(ii) Liew's exercise of power to allot PNLBS' shares to PNLBS is invalid as the allotment was made without Loh's consent; and

(iii) Liew's exercise of power to appoint Paul and Nicholas as Fintree's directors is invalid, on the same ground.

[12] Premised on these contentions, Loh sought *inter alia*, the following reliefs in OS 85:

(i) a declaration that Liew's shares are held on trust by Liew on behalf of Loh;

(ii) a declaration that Loh is the legal and beneficial owner of Liew's shares; and

(iii) an order that Liew carries out and/or takes all necessary steps to effect and perfect the transfer of Liew's shares from Liew to Loh and/or his nominee.

[13] Loh subsequently filed OS 611 against Liew, Fintree, PNLBS, and Paul and Nicholas as directors of Fintree. He sought *inter alia*, the following reliefs in OS 611:

(i) a declaration that the allotment and issuance of PNLBS' shares are in breach of Liew's trust to Loh;

(ii) a declaration that the registration of PNLBS' shares in the name of PNLBS in the register of members of Fintree is invalid, void and of no effect;

(iii) an order that PNLBS' shares be cancelled from the register of Fintree;

(iv) a declaration that Liew had acted in breach of trust in causing the unlawful appointments of Paul and Nicholas as directors of Fintree; and

(v) a declaration that the appointments of Paul and Nicholas as directors of Fintree are invalid, void and of no effect, and that these appointments be invalidated and/or set aside.

A **Considerations And Findings**

[14] After considering the evidence before this court, I came to three findings:

(i) Loh had failed to prove Liew's shares were held on trust for Loh.

B (ii) The issuance and allotment of PNLBS' shares and the appointment of Paul and Nicholas as directors of Fintree are valid.

(iii) Allowing OS 85 and OS 611 will result in the continuous breach of Loh's duties to PNLBS.

C **[15]** There are a few reasons I reached these findings. Firstly, Loh's claim that Liew's shares were held by Liew on Loh's behalf is unsupported by evidence, documentary or otherwise. Loh is also estopped from contending that a trust relationship exists between him and Liew, due to the inconsistent approaches he had taken in relation to his position in Fintree. Finally, I took the view that the allotment of PNLBS' shares and the appointment of Paul D and Nicholas as Fintree's directors are carried out by Liew in a manner that is well within his authority as the sole director and shareholder of Fintree.

Finding 1: Loh Failed To Prove Liew's Shares Were Held On Trust For Him

E **[16]** Loh's allegation that Liew's shares were held on trust for him is premised firstly on his claim that Fintree was incorporated on 14 May 2020 with a paid-up capital at the date of incorporation of RM100,000 comprising 100,000 ordinary shares at RM1 each, *ie*, Liew's shares. Loh claimed he advanced RM100,000 for Liew's shares, and he asked Liew to hold the shares on trust for him on the basis that the shares are to be re-transferred F to him or a nominee of his choice at the time of his choosing.

[17] The claim is not supported by any documentary evidence. Instead, Fintree's incorporation documents and resolutions as well as documents filed with the Companies Commission of Malaysia, show that:

G (i) Liew incorporated Fintree on 14 May 2020. He was the sole director and shareholder in Fintree. He paid the sum of RM1 for the initial share capital of Fintree;

(ii) by way of a member's circular resolution and a director's circular resolution, both dated 10 August 2020, 99,999 new ordinary shares H were issued to Liew for RM99,999 by way of capitalisation of the amount owing by Fintree to Liew; and

(iii) after the issuance and allotment of new shares on 10 August 2020, Liew held 100,000 shares in Fintree *ie*, Liew's shares.

I **[18]** The above show that Loh's claim that the paid-up capital of Fintree at the date of incorporation was RM100,000 comprising Liew's shares, is incorrect. It also follows that Loh could not have advanced the sum of RM100,000 for Fintree's initial paid-up capital at the material time.

[19] Further, Loh did not provide any evidence to support his claim that he asked Liew to hold Liew's shares on trust for him, on the specific basis that the said shares were to be re-transferred to Loh or a nominee of Loh's choice at the time of Loh's choosing. What is also detrimental to Loh's case is Liew's denial of any such understanding or arrangement between himself and Loh.

[20] Liew did acknowledge the following:

(i) Loh advanced to him monies to be used towards the paid-up capital of Fintree;

(ii) Loh advanced to him monies to be used to pay for Fintree's rental deposit, office equipment, computers, initial staff salaries and working capital for Fintree's operations;

(iii) In December 2020, Loh had at Liew's request, issued two cheques in favour of Fintree totalling RM300,000 as an advance to Fintree, for working capital; and

(iv) Liew consulted Loh on the affairs of Fintree, as he respected Loh as his mentor.

[21] I am of the view that the above events, and the acknowledgement by Liew that the events occurred, do not create a trust relationship such that Liew's shares belong beneficially to Loh or that Liew's shares were held by Liew on trust for Loh.

[22] I also note Liew's admission that he was under the initial impression that he was to hold Liew's shares on trust for Loh. This impression did not arise from any discussion with Loh, but from Loh's advancing of monies used to run Fintree's operations. However, Liew highlighted that the position taken by Loh in Kuala Lumpur High Court Originating Summons WA-28JM-1-01-2021 ("JM1"), as discussed below, had led him to the realisation that his initial impression was incorrect.

[23] JM1 is Loh's application to place Fintree under judicial management, on the basis that Loh was a creditor of Fintree. Loh's position that he is a creditor of Fintree is inconsistent with his claim in these proceedings that he is the beneficial owner of Liew's shares.

[24] Loh had averred in affidavits in JM1, that:

(i) he loaned the sum of RM100,000 to Liew in order to pay up the share capital of Fintree.

(ii) he also advanced funds to Liew for Fintree to renovate its office and to pay its initial staff salaries, rental deposit and operating infrastructure.

(iii) in December 2020, Liew requested for RM300,000 to be advanced to Fintree as working capital. Loh wrote two cheques totalling RM300,000 to Fintree, the monies advanced were used for capital expenditure for Fintree.

(iv) he is a creditor and financier of Fintree.

[25] Loh's position in JM1 that he is a creditor and financier of Fintree is inconsistent with what he is now asserting, that he had asked Liew to hold Liew's shares on trust for him.

[26] In *Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd & Another Appeal* [2006] 1 CLJ 996, the Court of Appeal considered the test to determine the existence of a valid trust:

> [60] The law governing the certainty of a trust is that laid down by Lord Langdale MR in the seminal case of *Knight v. Knight* [1840] 49 ER 68. There it was held that for a trust to be certain **three requirements must be fulfilled.** First, there must be **certainty of intention.** Second there must be **certainty of subject matter:** both in terms of the *corpus* and the beneficial interest. Third, there must be **certainty of the objects** of the trust. **A trust is void if there is uncertainty in any of these three elements.** (emphasis added)

[27] A declaration of trust may be made either formally or informally. If it is made informally or orally, the words used must be clear, unequivocal and irrevocable (see *Wan Naimah v. Wan Mohamad Nawawai* [1972] 1 LNS 164; [1974] 1 MLJ 41 and *Teoh Heng Seng & Ors v. Teoh Kiew Seng & Anor* [2005] 3 CLJ 15).

[28] In *ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd* [2004] 4 CLJ 674, the Court of Appeal quoted the following passage in *Re Kayford Ltd* [1975] 1 All ER 604:

> … There is no doubt about the so-called 'three certainties' of a trust. The subject-matter to be held on trust is clear, and so are the beneficial interests therein, as well as the beneficiaries. As for the requisite certainty of words, it is well settled that a trust can be created without using the words 'trust' or 'confidence' or the like: **the question is whether in substance a sufficient intention to create a trust has been manifested.** (emphasis added)

[29] The burden of proof falls on Loh to establish the creation of a trust arrangement. In *Perman Sdn Bhd & Ors v. European Commodities Sdn Bhd & Anor* [2005] 4 CLJ 750, the Court of Appeal held that:

> **The standard of proving that an express trust exists in given circumstances is a high one.** For, it is the policy of the law that no person's property should be burdened with the interest of another in the absence of the clearest proof. What the law requires is an intention to create a trust expressed in clear language … (emphasis added)

[30] With the inconsistency in the stand taken by Loh in the proceedings before this court *ie*, that a trust exists between him and Liew in respect of Liew's shares, and in JM1 *ie*, that he is a creditor of Fintree, I find Loh has failed to discharge the high burden of proving the existence of a trust. Such inconsistency has led me to conclude that there is no certainty of intention that could have led to the reasonable probability that a trust existed in respect of Liew's shares.

[31] On this issue of certainty of intention, learned counsel for Loh relied on the following passage of the judgment of the Court of Appeal in *Ikumi Terada v. Jemix Co Ltd & Ors And Other Appeal* [2019] 1 LNS 881; [2019] MLJU 561:

> [38] According to *Halsbury's Malaysia* para [310.043], the law allows a declaration of trust of any property to be made informally and by parole. There is no necessity for a declaration of trust to be made in writing, to be valid (*Teoh Heng Seng v. Teoh Kiew Seng* [2000] 1 MLJ 707). *In respect of the certainty of intention, there had to be clear evidence of an intention to create a trust and this could be inferred not only from the alleged settlor's words and conduct but also of the surrounding circumstances and the interpretation of any agreements that might have been entered into* (*Guy Neale v. Nine Squares Pty Ltd* [2014] SGCA 64). It is not necessary for a trust to be in writing (*Wan Naimah v. Wan Mohamad Nawawai* [1974] 1 MLJ 41). Intention is a matter of evidence and it can be established by way of inference (*Emas Offshore v. Suhaimi Maryani* [2014] 10 CLJ, 279). *A person's intention for a trust is to be gathered from the totality of the particular circumstances of the case, including the words written or spoken and the conduct of the parties* (*ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd* [2004] 4 CLJ 674). (emphasis added)

[32] I am of the view the totality of the circumstances of the cases before this court, and in particular, the position taken by Loh in JM1 have raised questions on Loh's actual intention in his dealings in Fintree. Consequently, there is no certainty of intention in relation to the creation of trust over Liew's shares.

[33] The averments by Loh that he is a creditor of Fintree also give rise to the doctrine of judicial estoppel. Judicial estoppel was considered by the Court of Appeal in *Peguam Negara Malaysia v. Nurul Izzah Anwar & Ors* [2017] 5 CLJ 595:

> [21] In any event, in law, the doctrine of judicial estoppel will only apply to a party where the said party, the appellant in this appeal, *had successfully and unequivocally persuaded the court on, or asserted, a position* in the Selangor Government case so that when that had taken place, *the appellant would be estopped from asserting an inconsistent position in a subsequent proceeding* which in this appeal is the application for judicial review. The essential function of judicial estoppel is to *prevent intentional inconsistency while the object of the rule is to protect the court from the perversion of judicial machinery. Judicial estoppel seeks to address the incongruity of allowing a party to assert a position in one court and the opposite in another tribunal.* (*Yugraneft* at para. 429) …
>
> (emphasis added)

[34] In *Leisure Farm Corporation Sdn Bhd v. Kabushiki Kaisha Ngu & Ors* [2017] 1 LNS 499; [2017] 5 MLJ 63, the Court of Appeal observed as follows:

> [16] … It is clear to this court that the object of judicial estoppel is to prevent a party who assumes a particular position in litigation to take an inconsistent position in later litigation. Christopher Clarke J explained the law on judicial estoppel in *OJSC Oil Co Yugraneft (in liquidation) v. Abramovich and others* [2008] EWHC 2613 (Comm) and we now quote the relevant excerpts:
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> > The Court of Appeals for the Sixth Circuit explained the position in *Edwards v. Aetna Life and Casualty* 690 F 2s 595 (1982):
> >
> > …
> >
> > *The doctrine of judicial estoppel applies to a party who has successfully and unequivocally asserted a position in a prior proceeding; he is estopped from asserting an inconsistent position in a subsequent proceeding* … Unlike equitable estoppel, judicial estoppel may be applied even if detrimental reliance or privity does not exist. … This distinction reflects the difference in the policies served by the two rules. Equitable estoppel protects litigants from less than scrupulous opponents. *Judicial estoppel, however, is intended to protect the integrity of the judicial process.* … *Scarano v. Central R Co*, 203 F 2d 510, 512-13 (3rd Cir 1953) ('such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the court should not tolerate'). *The essential function of judicial estoppel is to prevent intentional inconsistency; the object of the rule is to protect the judiciary, as an institution, from the perversion of judicial machinery.* … Collateral estoppel is essentially a finality rule, which serves to conserve judicial resources by precluding the litigation of issues previously decided. *Judicial estoppel addresses the incongruity of allowing a party to assert a position in one tribunal and the opposite in another tribunal. If the second tribunal adopted the party's inconsistent position, then at least one court has probably been misled* …
> >
> > …
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> [17] Also cited by learned counsel in the course of his oral submission on this point is this court's decision in the case of *Zulpadli bin Mohammad & Ors v. Bank Pertanian Malaysia Bhd* [2013] 2 MLJ 915 in which it was held that the respondent's own admission in the earlier suit as well as the amended statement of claim in the present suit showed that the appellants were innocent victims as much as the respondent was. The respondent was estopped from taking a position different from that pleaded in its defence in the earlier suit. *Clearly, the essential function of judicial estoppel is to prevent intentional inconsistency while the object of the rule is to protect the court from the perversion of judicial machinery. Judicial estoppel seeks*

to address the incongruity of allowing a party to assert a position in one court and the opposite in another tribunal (Peguam Negara Malaysia v. Nurul Izzah bt Anwar & Ors [2017] MLJU 273).

[18] On the facts of the present case, we are satisfied that the appellant had unequivocally assumed a position that the transfer of the entire issued and paid up shares of the second respondent to the third party new shareholders defeats, overcomes and renders illusory and nugatory this very appeal. *The appellant cannot now change its stance in this appeal adopting a completely different position* that specific performance should be ordered in their favour in respect of the subject matter which has ceased to exist. Such position, we would say, is incongruous with their position manifested in its affidavit and argument in the earlier proceedings and thus certainly flies in the face of the appellant's earlier position it stood for during the committal proceedings. (emphasis added)

[35] In the actions before this court, the position taken by Loh is diametrically opposite from the position taken by him in JM1. In JM1, the position taken by Loh is that he is a creditor of Fintree. Loh did not then claim that he had requested Liew to hold Liew's shares on trust for him or that they were to be transferred to him or his nominee at any time of his choosing. Neither did he state that he is the ultimate beneficial owner of Fintree.

[36] Guided by *Nurul Izzah Anwar* and *Leisure Farm Corp*, I am of the view that it is not open to Loh to now resile from his earlier position and make positive averments in these actions that are inconsistent and wholly contradictory to the position he had taken in JM1. This is particularly so, as the position taken in JM1 had led the High Court to find in his favour. By his averments in JM1, Loh has abandoned or renounced any claim of beneficial ownership to the shares of Fintree. If this is not the case and Loh is insisting on pursuing his claim of beneficial ownership of the shares of Fintree, this would mean that his claims and averments in JM1 were false and designed to mislead the court therein.

[37] The doctrine of judicial estoppel would still apply to these cases notwithstanding the reversal of the High Court decision by the Court of Appeal on 22 February 2022. The fact remains that the averments Loh made in JM1 had led to High Court to make certain findings of facts, and Loh is now disowning these averments in the actions before this court.

[38] From the assessment above, I am of the considered view that Loh has failed to prove the existence of a trust in respect of Liew's shares.

Finding 2: The Issuance And Allotment Of PNLBS' Shares And The Appointment Of Paul And Nicholas As Directors Of Fintree Are Valid

[39] It is undisputed that the issuance and allotment of PNLBS' shares and the appointment of the additional directors of Fintree were authorised by Liew as sole director and shareholder of Fintree.

[40] As Liew is the sole shareholder and director of Fintree, he has both actual and implied authority to allot PNLBS' shares and appoint Nicholas and Paul as directors of Fintree.

[41] Thus, the issuance and allotment of PNLBS' shares and the appointment of Paul and Nicholas as directors of Fintree have been validly carried out.

Finding 3: Allowing OS 85 And OS 611 Will Result In The Continuous Breach Of Loh's Duties To PNLBS

[42] In OS 85, Loh sought orders to declare Loh as the beneficial owner of Liew's shares and to compel Fintree to rectify its share register by replacing Loh as the shareholder of Liew's shares. In OS 611, Loh sought a declaration that the issuance of PNLBS' shares is invalid and an order that PNLBS' shares be cancelled.

[43] The cumulative effects of the prayers of OS 85 and OS 611 would be to oust both Liew and PNLBS as shareholders of Fintree, resulting in Loh having 100% control over Fintree's shares. Loh would consequently have sole control over Fintree, thus allowing him to continue Fintree's business under his sole direction.

[44] However, the following undisputed facts must be considered:

(i) Loh is a director of PNLBS;

(ii) PNLBS, together with its associate company, PNL Capital Sdn Bhd ("PNLC") have been carrying out the business of financial advisory services; and

(iii) since its incorporation, Fintree had been carrying out the same type of business as PNLBS.

[45] With the undisputed facts set out above, it is clear that Loh's involvement in Fintree in the manner sought in the prayers in OS 85 and OS 611 will put him in a position of conflict of interest, *vis-à-vis* his position as a director of PNLBS.

[46] Section 218(1) of the Companies Act 2016 provides that:

> (1) A director or officer of a company shall not, without the consent or ratification of a general meeting:
>
> (a) use the property of the company;
>
> (b) use any information acquired by virtue of his position as a director or officer of the company;
>
> (c) use his position as such director or officer;

(d) use any opportunity of the company which he became aware of, in the performance of his functions as the director or officer of the company; or

(e) engage in business which is in competition with the company, to gain directly or indirectly, a benefit for himself or any other person, or cause detriment to the company.

[47] There are penal consequences to the contravention of s. 218(1), which are set out in s. 218(2):

(2) Any person who contravenes this section commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or a fine not exceeding three million ringgit or to both.

[48] The above provision is clear. Loh is not permitted to engage in business that is in competition with the business of PNLBS, a company in which he is a director. The exception to this prohibition, as set out in s. 218(1) is where a director has obtained "consent or ratification of a general meeting". It is undisputed that Loh had not obtained any such consent or ratification.

[49] The prayers in OS 85 and OS 611, if allowed, would result in an engagement prohibited under s. 218 of the Companies Act 2016, as Loh would own and have full control over Fintree, a company in direct competition with PNLBS.

[50] Thus, applying the doctrine in *Patel v. Mirza* [2017] 1 All ER 191, I am of the view that OS 85 and OS 611 should be dismissed.

[51] In *Patel*, the claimant paid money to the defendant to trade shares using insider information which the defendant was expected to receive. The insider information did not transpire. The claimant brought an action to recover the money he paid to the defendant. The issue before the Supreme Court was whether the claimant was precluded from recovering money paid for illegal activity. Lord Toulson formulated three considerations to determine whether the action of a claimant should be allowed if the defence of illegality and public policy are raised:

[120] The essential rationale of the illegality doctrine is that it would be *contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system* (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary *(a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.* Within that framework, various factors may be relevant, but it would be a mistake to

A suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate. (emphasis added)

B **[52]** The considerations in *Patel* were approved and are applicable in Malaysia by virtue of the Federal Court decision in *Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd* [2019] 1 CLJ 183; [2019] 4 MLJ 141.

[53] Applying the trio of considerations in *Patel*, my views are as follows:

C (i) on the first consideration, which is the underlying purpose of the prohibition transgressed and whether that purpose will be enhanced by denial of the claim, I looked to the policy behind s. 218 of the Companies Act 2016. The provision is intended to protect a company from the misuse of its property, information and resources by a director or an officer of the company in a manner that would deprive the D company of business and opportunities. Specifically, s. 218(1)(e) prevents a director of a company from undertaking competing businesses, which would put him in a position of conflict of interest. A director is by law required to conduct himself with utmost good faith and abstain from any risk of conflict of interest;

E (ii) in this regard, allowing OS 85 and OS 611 would mean that Loh will be managing Fintree, a company with business in direct competition with PNLBS. This situation puts Loh in direct conflict with his duties as a director in PNLBS. Conversely, denying Loh of the prayers in OS 85 and OS 611 will enhance the purpose of s. 218, in line with F consideration (a) in *Patel*;

(iii) on the other hand, Loh's complaints are that the dismissal of OS 85 and OS 611 would lead to Liew being unjustly enriched, and that Loh's consent must be sought before the allotment of PNLBS' shares could take place. The crux of Loh's case is the breach of the purported trust G between Loh and Liew;

(iv) it is my view in assessing consideration (b) in *Patel*, that the prohibition under s. 218 of the Companies Act 2016 and laws imposing fiduciary duties on directors must be given greater weight than the purported H unjust enrichment as proffered by Loh;

(v) further, a trust can only be given effect if it does not violate the law. In this case, the alleged trust would result in a contravention of s. 218 and undermine the well-established principle of a director's fiduciary duties to a company. As such, the court should not give effect to the trust; and

I

(vi) I am of the further view, in assessing consideration (c) in *Patel*, that the dismissal of OS 85 and OS 611 would be a proportionate response to the illegality arising from Loh's management of Fintree in conflict with PNLBS. Loh's argument in this regard is Liew's unjust enrichment in the receipt of Liew's shares. I take the view that it is sufficient for Loh to simply claim the sum of RM100,000 from Liew, as opposed to making a claim for Liew's shares.

Decision

[54] To summarise my findings above:

(i) I firstly found that Loh failed to prove Liew's shares were held on trust for Loh. There is insufficient evidence to prove Loh's claim of a trust relationship between Loh and Liew. Due to the inconsistent position taken by Loh on this issue, Loh is also estopped from contending that a trust relationship existed between him and Liew;

(ii) second, I found the allotment of PNLBS' shares and appointment of Paul and Nicholas as Fintree's directors, are carried out by Liew in a manner that is well within his authority as the sole director and shareholder of Fintree; and

(iii) finally, I took the view that allowing OS 85 and OS 611 will result in the continuous breach of Loh's duties to PNLBS.

[55] With the findings above, I dismissed encls. 1 in both OS 85 and OS 611, with costs.